REGINA

v.

HORSEFERRY ROAD MAGISTRATES COURT, EX PARTE BENNETT

HOUSE OF LORDS,
LORD GRIFFITHS,
LORD BRIDGE OF HARWICH,
LORD OLIVER OF AYLMERTON,
LORD LOWRY,
LORD SLYNN OF HADLEY
24 JUNE 1993

CRIMINAL LAW: Jurisdiction - Appellant arrested in South Africa and forcibly brought to England - Application for judicial review - Whether High Court had jurisdiction to inquire into circumstances by which appellant came within the jurisdiction - Procedure - Examining Magistrates - Whether they have power to decline to proceed on ground of abuse of process of the Court - Extent of power - Whether adjournment can be granted to challenge jurisdiction of the Court.

The appellant was a New Zealand citizen who was wanted for criminal offences which it was alleged he committed in connection with the purchase of a helicopter in England in 1989. He was eventually traced to South Africa. The English Police decided not to request his return through the extradition process. The appellant claimed that they however persuaded the South African police to arrest him in South Africa and to forcibly return him to England, under the pretext of deporting him to New Zealand *via* Heathrow so that he could be arrested at Heathrow and tried for the offences he was alleged to have committed.

In May 1991 the appellant was brought before a stipendiary Magistrate for the purpose of committal proceedings. His application for adjournment to permit him to challenge the jurisdiction of the Court was refused, and the appellant was committed to the Southwark Crown Court.

The appellant obtained leave to bring proceedings for judicial review to challenge the decision of the Magistrate. The Divisional Court ruled, as a preliminary issue, that there was no jurisdiction vested in the Court to inquire into the circumstances by which the appellant came to be within the jurisdiction and dismissed the application. It certified a question of law for the House of Lords, as to whether the Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction.

Held

[1] The High Court in the exercise of its supervisory jurisdiction has power to enquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused.

> My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has accured because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the Court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.
> - per Lord Griffiths

> When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the Court, I think that respect for the rule of law demands that the Court take cognisance of that circumstance. To hold that the Court turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view.
> - per Lord Bridge of Harwich

> If proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future and thus will tend to maintain the purity of the stream of justice. No 'floodgates' argument applies because the executive can stop the flood at source by refraining from impropriety.
> - per Lord Lowry

> I do not consider that, either as a matter of established law or as a matter of principle, a Criminal Court should be concerned to entertain questions as to the propriety of anterior executive acts of the law enforcement agencies which have no bearing upon the fairness or propriety of the trial process or the ability of the accused to defend himself against charges properly brought against him.
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> - per Lord Oliver of Aylmerton (dissenting)

[2] The Magistrates have jurisdiction to decline to allow a criminal prosecution to proceed on the ground that it amounted to an abuse of the process of the Court. They have jurisdiction, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction.

[3] However, it must be appreciated by the Magistrates that this is a power to be most sparingly exercised. The power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of Court procedure. The wider supervisory jurisdiction with which the Court was concerned in the present appeal under the head of abuse of process is very different. The wider responsibility for upholding the rule of law must be that of the High Court and if a serious question arises as to the deliberate abuse of extradition procedures a Magistrate should allow an adjournment so that an application can be made to the Divisional Court which is the proper forum in which such a decision should be taken.

Per curiam:

The Courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused. - per Lord Devlin in *Connelly v. Director of Public Prosecutions* [1964] AC 1254, 1354.

[Appeal allowed. Case remitted to the Divisional Court for further consideration].

Cases referred to:

Reg v. Bow Street Magistrates' Court, Ex parte Mackeson [1981] 75 Cr. App. R. 24 ***(foll)***
Rex v. Officer Commanding Depot Battalion, RASC Colchester, Ex parte Elliott [1949] 1 All ER 373 ***(refd)***
Reg v. Hartley [1978] 2 NZLR 199 ***(foll)***
Reg v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 WLR 108 ***(foll)***
Reg v. Plymouth Justices, Ex parte Driver [1986] QB 95 ***(not foll)***
Ex parte Susannah Scott [1829] 9 B & C 446 ***(not foll)***
Sinclair v. H.M. Advocate [1890] 17 R(J) 38 ***(not foll)***
Ker v. Illinois [1886] 119 US 436, 444 ***(refd)***
United States of America v. Sobell [1956] 142 Supp. 515; [1957] 244 F. 2d 520 ***(refd)***
Reg v. Sang [1980] AC 402, 454 ***(refd)***
United States v. Humberto Alvarez-Machain [1992] 119 L. Ed. 2d 441 ***(refd)***
Rex v. Whiteside [1904] 8 Can. Cr. Cas. 478 ***(refd)***
Rex v. Walton [1905] 10 Can. Cr. Cas. 269 ***(refd)***
Moevao v. Department of Labour [1980] 1 NZLR 464, 467, 475-476 ***(refd)***
S v. Ebrahim 1991 (2) S.A. 553 ***(foll)***
Reg v. Derby Crown Court, Ex parte Brooks [1984] 80 Cr. App. R. 164 ***(refd)***
Chu Piu Wing v. Attorney-General [1984] HKLR 411 ***(refd)***
Reg v. Croydon Justices, Ex parte Dean (unreported) 19 February 1993 ***(refd)***
Connelly v. Director of Public Prosecutions [1964] AC 1254, 1354 ***(foll)***
Reg v. Governor of Pentonville Prison, Ex parte Sinclair [1991] 2 AC 64 ***(refd)***
Atkinson v. United States of America Government [1971] AC 197 ***(refd)***
Reg v. Humphrys [1977] AC 1, 26 ***(refd)***
Mills v. Cooper [1967] 2 QB 459 ***(refd)***
Reg v. Canterbury and St. Augustine Justices, Ex parte Klisiak [1982] QB 398 ***(refd)***
Reg v. West London Stipendiary Magistrate, Ex parte Anderson [1984] 80 Cr. App. R. 143 ***(refd)***
Reg v. Telford Justices, Ex parte Badhan [1991] 2 QB 78, 81 ***(foll)***
Reg v. Oxford City Justices, Ex parte Smith [1982] 75 Cr. App. R. 200 ***(refd)***
Reg v. Horsham Justices, Ex parte Reeves (Note) [1980] 75 Cr. App. R. 236 ***(refd)***
Frisbie v. Collins 342 US 519 ***(refd)***
United States v. Toscanino [1974] 500 F. 2d 267, 268 ***(refd)***
Rourke v. R [1977] 76 DLR (3d) 193 ***(refd)***
Reg v. Grays JJ, Ex parte Low [1989] 88 Cr. App. R 291 ***(refd)***
Rex v. Lee Kun [1916] 1 KB 337, 341 ***(refd)***
Lam Chi-Ming v. The Queen [1991] 2 AC 212 ***(refd)***
Grassby v. The Queen [1989] 168 CLR 1 ***(refd)***
R (Martin) v. Mahony [1910] 2 IR 695 ***(refd)***
Rex v. Nat Bell Liquors [1922] 2 AC 128 ***(refd)***
Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw [1952] 1 KB 338 ***(refd)***
In re McC. (a minor) [1985] AC 528 ***(refd)***
In re Ashton [1993] 2 WLR 846 ***(refd)***

Legislation referred to:

Administration of Justice (Miscellaneous Provisions) Act 1933, s. 2(2)
Criminal Law Act 1967, s. 4(1)
Crown Court Act 1971

Extradition Act 1989, ss. 6(4), 15
Fourteenth Amendment to the US Constitution
Justices Act, s. 41(6)
Police and Criminal Evidence Act 1984, s. 78
Theft Acts

Other sources referred to:
Archbold (1992 Edn.) para 4.44

JUDGMENT

Lord Griffiths

My Lords,

The appellant is a New Zealand citizen who is wanted for criminal offences which it is alleged he committed in connection with the purchase of a helicopter in this country in 1989. The essence of the case against him is that he raised the finance to purchase the helicopter by a series of false pretences and has defaulted on the repayments.

The English police eventually traced the appellant and the helicopter to South Africa. The police, after consulting with the Crown Prosecution Service, decided not to request the return of the appellant through the extradition process. The affidavit of Detective Sergeant Martin Davies of the Metropolitan Police of New Scotland Yard deposes as follows:

> I originally considered seeking the extradition of the applicant from South Africa. I conferred with the Crown Prosecution Service, and it was decided that this course of action should not be pursued. There are no formal extradition provisions in force between the United Kingdom and the Republic of South Africa and any extradition would have to be by way of special extradition arrangements under s. 15 of the Extradition Act 1989. No proceedings for the applicant's extradition were ever initiated.

It is the appellant's case that, having taken the decision not to employ the extradition process, the English police colluded with the South African police to have the appellant arrested in South Africa and forcibly returned to this country against his will. The appellant deposes that he was arrested by two South African detectives on 28 January 1991 at Lanseria South Africa, who fixed a civil restraint order on the helicopter on behalf of the UK finance company and told the appellant that he was wanted by Scotland Yard and he was being taken to England. Thereafter he was held in police custody until he was placed on an aeroplane in Johannesburg ostensibly to be deported to New Zealand via Taipei. At Taipei when he attempted to disembark he was restrained by two men who identified themselves as South African police and said that they had orders to return him to South Africa and then to the United Kingdom and hand him over to Scotland Yard. He was returned to South Africa and held in custody until he was placed, handcuffed to the seat, on a flight from Johannesburg on 21 February arriving at Heathrow on the morning of 22 February when he was immediately arrested by three police officers including Detective Sergeant Davies. He further deposes that he was placed on this flight in defiance of an order of the Supreme Court of South Africa obtained by a lawyer on his behalf on the afternoon of 21 February.

The English police through Sergeant Davies deny that they were in any way involved with the South African police in returning the appellant to this country. They say that they had been informed that there were a number of warrants for the appellant's arrest in existence in Australia and New Zealand and that they requested the South African police to deport the appellant to either Australia or New Zealand and it was only on 20 February that the English police were informed by the South African police that the appellant was to be repatriated to New Zealand by being placed on a flight to Heathrow from whence he would then fly on to New Zealand. Sergeant Davies does, however, depose in a second affidavit as follows:

> 1. Further to my affidavit sworn in the above mentioned proceedings on 29 November 1991, my earliest communications with the South African authorities following the applicant's arrest were with the South African police with a view to his repatriation to New Zealand or deportation to Australia and his subsequent extradition from one of those countries to England. I discussed with the South African police the question as to whether the applicant would be returned via the United Kingdom and I was informed by them that he might be returned via London. I sought advice from the Crown Prosecution Service and from the Special Branch of the Metropolitan Police as to what the position would be if he were so returned. I informed the South African police by telephone that if the applicant were returned via London he would be arrested on arrival. Subsequently I was informed by the South African police that the applicant could not be repatriated to New Zealand via Heathrow ...

4. I now recollect that it was on 20 February and not on 21 February as I stated in my previous affidavit, that the South African police informed me on the telephone that the applicant was to be returned to New Zealand via Heathrow. On the same day I consulted the Crown Prosecution Service and it was decided that the English police would arrest the applicant on his arrival at Heathrow.

It is not for your Lordships to pass judgment on where truth lies at this stage of the proceedings but for the purpose of testing the submission of the respondents that a court has no jurisdiction to inquire into such matters it must be assumed that the English police took a deliberate decision not to pursue extradition procedures but to persuade the South African police to arrest and forcibly return the appellant to this country, under the pretext of deporting him to New Zealand via Heathrow so that he could be arrested at Heathrow and tried for the offences of dishonesty he is alleged to have committed in 1989. I shall also assume that the Crown Prosecution Service were consulted and approved of the behaviour of the police.

On 22 May 1991 the appellant was brought before a stipendiary magistrate for the purpose of committal proceedings. Counsel for the appellant requested an adjournment to permit him to challenge the jurisdiction of the magistrates' court. The application was refused and the appellant was committed for trial to the Southwark Crown Court on five offences of dishonesty. The appellant obtained leave to bring proceedings for judicial review to challenge the decision of the magistrate. On 22 July 1992 the Divisional Court ruled that as a preliminary issue the court would consider whether there was jurisdiction vested in the Divisional Court to inquire into the circumstances by which the appellant had come to be within the jurisdiction of the courts of England and Wales.

On 31 July 1992 the Divisional Court held that even if the evidence showed collusion between the Metropolitan Police and the South African police in kidnapping the appellant and securing his enforced illegal removal from the Republic of South Africa there was no jurisdiction vested in the court to inquire into the circumstances by which the appellant came to be within the jurisdiction and accordingly dismissed the application for judicial review. The Divisional Court has certified the following question of law:

> Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction.

The Divisional Court in this case was faced with conflicting decisions of the Divisional Court in earlier cases. In *Reg. v. Bow Street Magistrates' Court, Ex parte Mackeson* [1981] 75 Cr. App. R. 24 the facts were as follows. The applicant was a British citizen who had left this country at the end of 1977 and in 1979 was working as a schoolteacher in Zimbabwe-Rhodesia. In May 1979 he was wanted by the Metropolitan Police for offences of fraud that he was alleged to have committed before he left this country. The Metropolitan Police were aware that no extradition was lawfully possible at that time because the Zimbabwe-Rhodesia Government was in rebellion against the Crown. The Metropolitan Police therefore told the authorities in Zimbabwe-Rhodesia that the applicant was wanted in England in connection with fraud charges with the result that he was arrested and a deportation order made against him. The applicant brought proceedings in Zimbabwe-Rhodesia - for the deportation order to be set aside which succeeded at first instance but the decision was set aside on appeal. No attempt was made to use the extradition process to secure the return of the applicant when Zimbabwe-Rhodesia returned to direct rule under the Crown in December 1979. On 17 April 1980 the applicant was placed upon a plane by the police in Zimbabwe-Rhodesia and arrested on his arrival at Gatwick by the Metropolitan Police on 17 April 1980. No evidence was offered in respect of the fraud charges but further charges were alleged against him under the Theft Acts. The applicant applied for an order of prohibition to prevent the hearing of committal proceedings against him in the magistrates court on those charges.

On these facts Lord Lane CJ. giving the judgment of the Divisional Court held, on the authority of *Rex v. Officer Commanding Depot Battalion, RASC, Colchester, Ex parte Elliott* [1949] 1 All ER 373, that the court had jurisdiction to try the applicant. He said, at p. 32:

> Whatever the reason for the applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. Consequently the mere fact that his arrival there

may have been procured by illegality did not in any way oust the jurisdiction of the court. That aspect of the matter is simple.

On the question of whether the court could or would exercise a discretion in favour of the applicant to order his release from custody Lord Lane CJ relied upon a passage in the judgment of Woodhouse J. in *Reg. v. Hartley* [1978] 2 NZLR 199, a decision of the Court of Appeal of New Zealand. In that case the New Zealand police had obtained the return of a man named Bennett from Australia to New Zealand where he was wanted on a charge of murder, merely by telephoning to the Australian police and asking them to arrest Bennett and put him on an aeroplane back to New Zealand, which they had done. Lord Lane CJ, cited the following extract from the judgment of Woodhouse J. [1978] 2 NZLR 199, 216-217:

> There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. And in our opinion there can be no possible question here of the court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis of reciprocity for similar favours earlier received are police officers here in New Zealand to feel free, or even obliged, at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime has been committed elsewhere? In the High Court of Australia Griffith CJ referred to extradition as a 'great prerogative power, supposed to be an incident of sovereignty' and then rejected any suggestion that 'it could be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished': *Brown v. Lizars* [1905] 2 CLR 837, 852. The reasons are obvious.
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> We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in New Zealand, could certainly be brought to trial and dealt with by the courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made at the trial on this ground, after the facts had been established by the evidence on the *voir dire*, the judge would probably have been justified in exercising his discretion under s. 347(3) or under the inherent jurisdiction to direct that the accused by discharged.

Lord Lane CJ followed that passage and exercised the court's discretion to order prohibition against the Magistrates' Court and to discharge the applicant.

Ex parte Mackeson, 75 Cr. App. R. 24, was followed by the Divisional Court in *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 WLR 108.

In *Reg. v. Plymouth Justices, Ex parte Driver* [1986] QB 95 a differently constituted Divisional Court after hearing argument containing more elaborate citation of authority declined to follow *Ex parte Mackeson* and held that the court had no power to inquire into the circumstance in which a person was found within the jurisdiction for the purpose of refusing to try him.

The Divisional Court regarded the law as settled by a trilogy of cases. *Ex parte Susannah Scott* [1829] 9 B & C 446, *Sinclair v. H.M. Advocate* [1890] 17 R (J) 38 and *Rex v. Officer Commanding Depot Battalion, RASC, Colchester, Ex parte Elliott* [1949] 1 All ER 373. These cases undoubtedly show that at the time they were decided the judges were not prepared to enquire into the circumstances in which a person came within the jurisdiction. In *Ex parte Susannah Scott* Lord Tenterden CJ granted a warrant for the apprehension of Scott so that she might appear and plead to a bill of indictment charging her with perjury. Ruthven, the police officer to whom the warrant was directed arrested Scott in Brussels. She applied to the British Ambassador for assistance but he refused to interfere and Ruthven brought her to Ostend and then to

England. A rule of *nisi* was obtained for a *habeas corpus* to bring up Scott in order that she might be discharged. In giving judgment Lord Tenterden CJ said, 9 B & C 446, 448:

> The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them.

In *Sinclair v. H.M. Advocate* [1890] 17 R (J) 38 the sheriff substitute of Lanarkshire granted a warrant to a Glasgow sheriff officer to arrest Sinclair for breach of trust and embezzlement and to receive him into custody from the government of Spain. The accused was brought before the sheriff substitute on this warrant and committed to prison to await his trial. He brought a bill of suspension and liberation in which he alleged that he had been arrested and imprisoned in Portugal by the Portuguese authorities without a warrant; that he had been put by them on board an English ship in the Tagus, and there had been taken into custody by a Glasgow detective officer without the production of a warrant; but during the voyage to London the vessel had been in the port of Vigo, in Spain, for several hours: that the complainer had demanded to be allowed to land there but had been prevented by the officer; that on arriving in London he was not taken before a magistrate, nor was the warrant endorsed, but he was brought direct to Scotland, and there committed to prison, and no warrant was ever produced or exhibited to him. It was held that these allegations did not set forth any facts to affect the validity of the commitment by the sheriff substitute, which proceeded upon a proper warrant.

In the course of his judgment the Lord Justice-Clerk said, at pp. 40-42:

> There are three stages of procedure in this case - first, there are the proceedings abroad where the complainer was arrested; second, there are the proceedings on the journey to this country; and third, the proceedings here. As regards the proceedings abroad and where the complainer was arrested, they may or may not have been regular, formal, and in accordance with the laws of Portugal and Spain, but we know nothing about them. What we do know is that two friendly powers agreed to give assistance to this country so as to bring to justice a person properly charged by the authorities in this country with a crime. If the Government of Portugal or of Spain has done anything illegal or irregular in arresting and delivering over the complainer his remedy is to proceed against these Governments. That is not a matter for our consideration at all, and we cannot be the judges of the regularity of such proceedings.
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> In point of fact the complainer was put on board a British vessel which was at that time in the roads at the mount of the Tagus, and given into the custody of a person who held a warrant to receive him, and who did so receive him. This warrant was perfectly regular, as also his commitment to stand his trial on a charge of embezzlement. If there was any irregularity in the granting or execution of these warrants the person committing such irregularity would be liable in an action of damages if any damage was caused. But that cannot affect the proceedings of a public authority here. The public authority here did nothing wrong. The warrants given to the officer to detain the prisoner were quite formal, and it is not said that he did anything wrong.
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> It is said that the Government of Portugal did something wrong, and that the authorities in this country are not to be entitled to obtain any advantage from this alleged wrongdoing. As I have said, we cannot be the judges of the wrongdoing of the Government of Portugal. What we have here is that a person has been delivered to a properly authorised officer of this country, and is now to be tried on a charge of embezzlement in this country. He is therefore properly before the court of a competent jurisdiction on a proper warrant. I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer, to induce him to put himself in the position of being arrested, as was the case in two of the cases cited. They were civil cases in which the procedure was at the instance of a private party for his own private ends, and the court very properly held that a person could not take advantage of his own wrongdoing. But that is not the case here.
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> No irregularity, then, involving suspension can be said to have taken place on his arrival in London and on his journey here. But even if the proceedings here were irregular I am of opinion that where a Court of competent jurisdiction has a prisoner before it upon a competent complaint they must proceed to try him, no matter what happened before, even although he may have been harshly treated by a foreign government, and irregularly dealt with by a subordinate officer.

Lord M'Laren stated his view in the following terms, at pp. 43-44:

> With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody ...
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> I am of opinion with your Lordships that, when a fugitive is brought before a magistrate in Scotland on a proper warrant, the magistrate has jurisdiction, and is bound to exercise it without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction.
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> In a case of substantial infringement of right this Court will always give redress, but the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention.

In *Rex v. Officer Commanding Depot Battalion RASC, Colchester, Ex parte Elliott* [1949] 1 All ER 373 a deserter from the RASC was arrested in Belgium by British officers accompanied by two Belgian police officers. He was brought to this country where he was charged with desertion and detained in Colchester barracks. He applied for a writ of *habeas corpus* which was issued and on the return of the writ he submitted that his arrest was illegal because the British authorities had no power to arrest him in Belgium and his arrest was contrary to Belgian law. Dealing with this submission Lord Goddard CJ said, at p. 376:

> The point with regard to the arrest in Belgium is entirely false. If a person is arrested abroad and he is brought before a Court in this country charged with an offence which that Court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: 'I was arrested contrary to the laws of the state of A or the state of B where I was actually arrested.' He is in custody before the Court which has jurisdiction to try him. What is it suggested that the Court can do? The Court cannot dismiss the charge of one without its being heard. He is charged with an offence against English law, the law applicable to the case. If he has been arrested in a foreign country and detained improperly from the time that he was first arrested until the time he lands in this country, he may have a remedy against the persons who arrested and detained him, but that does not entitle him to be discharged, though it may influence the Court if they think there was something irregular or improper in the arrest.

Lord Goddard CJ then reviewed the decisions in *Ex parte Susannah Scott*, 9 B & C 446, and *Sinclair v. H.M. Advocate*, 17 R (J) 38, and after citing the passage in the speech of Lord M'Laren which I have already cited Lord Goddard CJ continued, at pp. 377-378:

> That, again, is a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of this Court.

There were also cited to the Divisional Court a number of authorities from the United States which showed that United States Courts have not regarded the constitutional right to "due process" as preventing a Court in the United States from trying an accused who has been kidnapped in a foreign country and forcibly abducted into the United States. (See *Ker v. Illinois* [1886] 119 US 436 and *United States of America v. Sobell* [1956] 142 Supp. 515; [1957] 244 F 2d 520).

Relying on this line of authonty the Divisional Court declined to follow *Mackeson* 75 Cr. App. R. 24, and held that it had no power to enquire into the circumstances in which the applicant was brought within the jurisdiction.

In the present case the Divisional Court approved the decision in *Ex parte Driver* [1986] QB 95 and in giving the leading judgment of the Court Woolf LJ said:

> However, quite apart from authority, I am bound to say it seems to me that the approach of Stephen Brown LJ [in *Reg. v. Plymouth Justices, Ex parte Driver* [1986] QB 95], in general, must be correct. The power which the Court is exercising, and the power which the

> Court was purporting to exercise, in *Ex parte Mackeson* is one which is based upon the inherent power of the Court to protect itself against the abuse of its own process. If the matters which are being relied upon have nothing to do with that process but only explain how a person comes to be within the jurisdiction so that that process can commence, it seems to me difficult to see how the process of the **Court** (and I emphasise the word "court") can be abused by the fact that a person may or may not have been brought to this country improperly.

However, in a later passage Woolf LJ drew a distinction between improper behaviour by the police and the prosecution itself, he said:

> Speaking for myself, I am not satisfied there could not be some form of residual discretion which in limited circumstances would enable a Court to intervene, not on the basis of an abuse of process but on some other basis which in the appropriate circumstances could avail a person in a situation where he contends that the prosecution are involved in improper conduct.

Your Lordships have been urged by the respondents to uphold the decision of the Divisional Court and the nub of their submission is that the role of the Judge is confined to the forensic process. The Judge, it is said, is concerned to see that the accused has a fair trial and that the process of the Court is not manipulated to his disadvantage so that the trial itself is unfair: but the wider issues of the rule of law and the behaviour of those charged with its enforcement, be they police or prosecuting authority, are not the concern of the judiciary unless they impinge directly on the trial process. In support of this submission your Lordships have been referred to *Reg. v. Sang* [1980] AC 402 and those passages in the speeches of Lord Diplock at pp. 436 437 and Lord Scarman at pp. 454-455, which emphasise that the role of the Judge is confined to the forensic process and that it is no part of the Judge's function to exercise disciplinary powers over the police or the prosecution.

The respondents have also relied upon the United States authorities in which the Supreme Court has consistently refused to regard forcible abduction from a foreign country as a violation of the right to trial by due process of law guaranteed by the Fourteenth Amendment to the Constitution. See in particular the majority opinion in *United States v. Humberto Alvarez- Machain* [1992] 119 L Edn. 2d 441 reasserting the Ker-Frisbie Rule. I do not, however, find these decisions particularly helpful because they deal with the issue of whether or not an accused acquires a constitutional defence to the **jurisdiction** of the United States Courts and not to the question whether assuming the Court has jurisdiction, it has a discretion to refuse to try the accused. See *Ker v. Illinois*, 119 US 436, 444.

The respondents also cited two Canadian cases decided at the turn of the century, *Rex v. Whiteside* [1904] 8 Can. Cr. Cas. 478 and *Rex v. Walton* [1905] 10 Can. Cr. Cas. 269 which show that the Canadian courts followed the English and American courts accepting jurisdiction in criminal cases regardless of the circumstances in which the accused was brought within the jurisdiction of the Canadian court. We have also had our attention brought to the New Zealand decision in *Moevao v. Department of Labour* [1980] 1 NZLR 464, in which Richmond P. expressed reservations about the correctness of his view that the prosecution in *Reg. v. Hartley* [1978] 2 NZLR 199 was an abuse of the process of the court and Woodhouse J. reaffirmed his view to that effect.

The appellant contends for a wider interpretation of the Court's jurisdiction to prevent an abuse of process and relies particularly upon the judgment of Woodhouse J. in *Reg. v. Hartley*, the powerful dissent of the minority in *United States v. Humberto Alvarez-Machain* and the decision of the South African Court of Appeal in *S. v. Ebrahim* [1991] (2) SA 553, the headnote of which reads:

> The appellant, a member of the military wing of the African National Congress who had fled South Africa while under a restriction order, had been abducted from his home in Mbabane, Swaziland, by persons acting as agents of the South African State, and taken back to South Africa, where he was handed over to the police and detained in terms of security legislation. He was subsequently charged with treason in a Circuit Local Division, which convicted and sentenced him to 20 years' imprisonment. The appellant had prior to pleading launched an application for an order to the effect that the Court lacked jurisdiction to try the case inasmuch as his abduction was in breach of international law and thus unlawful. The application was dismissed and the trial continued.
>
> The Court, on appeal against the dismissal of the above application, held, after a thorough investigation of the relevant South African and common law, that the issue as to the effect of

> the abduction on the jurisdiction of the trial court was still governed by the Roman and Roman-Dutch common law which regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction and thus constituted a serious injustice. A Court before which such a person was brought also lacked jurisdiction to try him, even where such a person had been abducted by agents of the authority governing the area of jurisdiction of the said court. The court further held that the above rules embodied several fundamental legal principles, *viz.* those that maintained and promoted human rights, good relations between states and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of states had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The state was bound by these rules and had to come to court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the state was involved in the abduction of persons across the country's borders.
>
> It was accordingly held that the court *a quo* had lacked jurisdiction to try the appellant and his application should therefore have succeeded. As the appellant should never have been tried by the court *a quo*, the consequences of the trial had to be undone and the appeal disposed of as one against conviction and sentence. Both the conviction and sentence were accordingly set aside.

In answer to the respondent's reliance upon *Reg. v. Sang* [1980] AC 402 the appellant points to s. 78 of the Police and Criminal Evidence Act 1984 which enlarges a judge's discretion to exclude evidence obtained by unfair means.

As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused. In *Reg. v. Derby Crown Court, Ex parte Brooks* [1984] 80 Cr. App. R. 164, Sir Roger Ormrod said, at pp. 168-169:

> The power to stop a prosecution arises only when it is an abuse of a process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable ...
>
> The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution.

There have, however, also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to try the accused for the offence that it amounted to an abuse of process. In *Chu Piu Wing v. Attorney-General* [1984] HKLR 411 the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a *subpoena ad testificandum* on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence, McMulen VP said, at pp. 417-18:

> there is a clear public interest to be observed in holding officials of the state to promises made by them in full understanding of what is entailed by the bargain.

And in a recent decision of the Divisional Court in *Reg. v. Croydon Justices, Ex parte Dean* (unreported), 19 February 1993, the committal of the accused on a charge of doing acts to impede the apprehension of another contrary to s. 4(1) of the Criminal Law Act 1967 was quashed on the ground that he had been assured by the police that he would not be prosecuted for any offence connected with their murder investigation and in the circumstances it was an abuse of process to prosecute him in breach of that promise.

Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.

Let us consider the position in the context of extradition. Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a *prima facie* case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by; I echo the words of Lord Devlin in *Connelly v. Director of Public Prosecutions* [1964] AC 1254, 1354:

> The Courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

The Courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.

In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.

If extradition is not available very different considerations will arise on which I express no opinion.

The question then arises as to the appropriate court to exercise this aspect of the abuse of process of jurisdiction. It was submitted on behalf of the respondents that the examining magistrates have no power to stay proceedings on the ground of abuse of process and reliance was placed on the decisions of this House in *Reg. v. Governor of Pentonville Prison, Ex parte Sinclair* [1991] 2 AC 64 and *Atkinson v. United States of America Government* [1971] AC 197, which established that in extradition proceedings a magistrate has no power to refuse to commit an accused on the grounds of abuse of process. But the reason underlying those decisions is that the Secretary of State has the power to refuse to surrender the accused if it would be unjust or oppressive to do so; and now under the Extradition Act 1989 an express power to this effect has been conferred upon the High Court.

Your Lordships have not previously had to consider whether justices, and in particular committing justices, have the power to refuse to try or commit a case upon the grounds that it would be an abuse of process to do so. Although doubts were expressed by Viscount Dilhorne as to the existence of such a power in *Reg. v. Humphrys* [1977] AC 1, 26, there is a formidable body of authority that recognises this power in the justices.

In *Mills v. Cooper* [1967] 2 QB 459, Lord Parker CJ hearing an appeal from justices who had dismissed an information on the grounds that the proceedings were oppressive and an abuse of the process of the court said, at p. 467E:

> So far as the ground upon which they did dismiss the information was concerned, every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court.

Diplock LJ expressed his agreement with this view, at p. 470F. In *Reg. v. Canterbury and St. Augustine Justices, Ex parte Klisiak* [1982] QB 398, 411F, Lord Lane CJ was prepared to assume such a jurisdiction. In *Reg. v. West London Stipendiary Magistrate, Ex parte Anderson*

[1984] 80 Cr. App. R. 143, Robert Goff LJ, reviewing the position at that date said, at p. 149:

> There was at one time some doubt whether magistrates had jurisdiction to decline to allow a criminal prosecution to proceed on the ground that it amounted to an abuse of the process of the court: see *DPP v. Humphrys* [1976] 63 Cr. App. R. 95, 144; [1977] AC 1, 19, per Viscount Dilhorne. However, a line of authority which has developed since that case has clearly established that magistrates do indeed have such a jurisdiction: see in particular *Brentford Justices, Ex parte Wong* [1981] 73 Cr. App. R. 67; [1981] QB 445; *Watford Justices, Ex parte Outrim* (1982) [1981] RTR 26; *Grays Justices, Ex parte Graham* [1982] 75 Cr. App. R. 229; [1982] 3 All ER 653. The power has, however, been described by the Lord Chief Justice as being 'very strictly confined': see *Oxford City Justices, Ex parte Smith* [1982] 75 Cr. App. R. 200, 204.

The power has recently and most comprehensively been considered and affirmed by the Divisional Court by *Reg. v. Telford Justices, Ex parte Badhan* [1991] 2 QB 78, 81.

Provided it is appreciated by magistrates that this is a power to be most sparingly exercised, of which they have received more than sufficient judicial warning (see, for example, Lord Lane CJ in *Reg. v. Oxford City Justices, Ex parte Smith* [1982] 75 Cr.App.R. 200 and Ackner LJ in *Reg. v. Horsham Justices, Ex parte Reeves (Note)* [1980] 75 Cr.App.R. 236.) it appears to me to be a beneficial development and I am urpersuaded that there are any sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the Divisional Court who are daily in much closer touch with the work in the magistrates court than your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 WLR 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken.

I would answer the certified question as follows: The High Court in the exercise of its supervisory jurisdiction has power to enquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused.

Accordingly I would allow this appeal and remit the case to the Divisional Court for further consideration.

Lord Bridge of Harwich

My Lords,

This appeal raises an important question of principle. When a person is arrested and charged with a criminal offence, is it a valid ground of objection to the exercise of the court's jurisdiction to try him that the prosecuting authority secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him from within the jurisdiction of some other state, in violation of international law, in violation of the laws of the state from which he was abducted, in violation of whatever rights he enjoyed under the laws of that state and in disregard of available procedures to secure his lawful extradition to this country from the state where he was residing? This is to state the issue very starkly, perhaps some may think tendentiously. But because this appeal has to be determined on the basis of assumed facts, your Lordships, as it seems to me, cannot avoid grappling with the issue in this stark form.

In this country and in Scotland the mainstream of authority, as the careful review in the speech of my noble and learned friend Lord Griffiths shows, appears to give a negative answer to the

question posed, holding that the courts have no power to examine the circumstances in which a prisoner was brought within the jurisdiction. I fully recognise the cogency of the arguments which can be adduced in support of this view, sustained as they are by the public interest in the prosecution and punishment of crime. But none of the previous authorities is binding on your Lordships' House and, if there is another important principle of law which ought to influence the answer to the question posed, then your Lordships are at liberty, indeed under a duty, to examine it and, if it transpires that this is an area where two valid principles of law come into conflict, it must, in my opinion, be for your Lordships to decide as a matter of principle which of the two conflicting principles of law ought to prevail.

When we look to see how other jurisdictions have answered a question analogous to that before the House in terms of their own legal systems, the most striking example of an affirmative answer is the decision of the South African Court of Appeal in *S. v. Ebrahim* [1991] (2) SA 553 allowing an appeal against his conviction for treason by a member of the African National Congress on the sole ground that he had been abducted from Swaziland, outside the jurisdiction of the South African court, by persons acting as agents of the South African state. This decision, as the summary in the headnote shows, resulted from the application of:

> ... several fundamental legal principles: *viz.* those that maintained and promoted human rights, good relations between States and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of States had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to Court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the State was involved in the abduction of persons across the country's borders.

In the United States, the authonties reveal a conflict of judicial opinion. The doctrine established by Supreme Court decisions in 1886, *Ker v. Illinois* 119 US 436, and in 1952, *Frisbie v. Collins* 342 US 519, accords substantially in its effect with the doctrine of the early English authorities. But more recently this doctrine has been powerfully challenged. In *United States v. Toscanino* [1974] 500 F. 2d 267, 268 the defendant, an Italian citizen, who had been convicted in the New York District Court of a drug conspiracy, alleged that the court had "acquired jurisdiction over him unlawfully through the conduct of American agents who had kidnapped him in Uruguay ... tortured him and abducted him to the United States for the purpose of prosecuting him there. The lower court having held that these allegations were immaterial to the exercise of its jurisdiction to try him, provided he was physically present at the time of trial, he appealed to the United States Court of Appeals Second Circuit. The effect of the court's decision is sufficiently summarised in the headnote. The court held:

> ... that federal district court's criminal process would be abused or degraded if it was executed against defendant Italian citizen, who alleged that he was brought into the United States from Uruguay after being kidnapped, and such abuse could not be tolerated without debasing the processes of justice so that defendant was entitled to a hearing on his allegations. ... Government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct.

The most recent decision of the United States Supreme Court in *United States v. Alvarez-Machain* [1992] 119 L.Ed. 2d 441 concerned a Mexican citizen indicted for the murder of an agent of the Drug Enforcement Administration (DEA). The District Court had held that other DEA agents had been responsible for the defendant's abduction from Mexico; that this had been in violation of the extradition treaty between Mexico and the United States; and that the accused should be discharged and repatriated to Mexico. This decision was affirmed by the United States Court of Appeals, Ninth Circuit, but reversed by the Supreme Court by a majority of 6 to 3. The opinions related primarily to the question whether the abduction was a breach of the treaty. The majority held that the abduction, although "shocking", involved no breach of the treaty and relied on the earlier decisions in the cases of *Ker,* 119 US 436, and *Frisbie,* 342 US 519, for the view that the

abduction was irrelevant to the exercise of the court's criminal jurisdiction. The dissenting opinion of Stevens J., in which Blackmun and O'Connor JJ. joined, held that the abduction was both in breach of the treaty and in violation of general principles of international law and distinguished the earlier authorities as having no application to a case where the abduction in violation of international law was carried out on the authority of the executive branch of the United States Government. The minority opinion was that this was an infringement of the rule of law which it was the court's duty to uphold. After referring to the South African decision in *S. v. Ebrahim*, Stevens J. writes in the final paragraph of his opinion, at pp. 466-467:

> The Court of Appeal of South Africa - indeed, I suspect most courts throughout the civilised world - will be deeply disturbed by the 'monstrous' decision the Court announces today. For every nation that has an interest in preserving the rule of law is affected, directly or indirectly, by a decision of this character.

In the common law jurisdiction closest to our own the opinion expressed by Woodhouse J. in the New Zealand case of *Reg. v. Hartley* [1978] 2 NZLR 199, in which he describes the issue as "basic to the whole concept of freedom in society," has already been cited by my noble and learned friend Lord Griffiths and I need not repeat it. In the later case of *Moevao v. Department of Labour* [1980] 1 NZLR 464, 475-476, Woodhouse J. cited the relevant passage from his own judgment in *Hartley* and added:

> It is not always easy to decide whether some injustice involves the further consequence that a prosecution associated with it should be regarded as an abuse of process. And in this regard the Courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution. In the *Connelly* case Lord Devlin referred to those matters and then, as I have said, he went on to speak of the importance of the Courts accepting what he described as their 'inescapable duty to secure fair treatment for those who come or are brought before them'. He said that 'the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused' [1964] AC 1254, 1353 ...
>
> Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is 'the process of law', to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the Court system. It is the function and purpose of the Courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase 'abuse of process' by itself does not give sufficient emphasis to the principle that in this context the Court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general. It is for reasons of this kind that I remain of the opinion that the trial Judge would have been entirely justified in the *Hartley* case in stopping the prosecution against the man Bennett.

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. If a resident in another country is properly extradited here, the time when the prosecution commences is the time when the authorities here set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of

extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests. It is apt, in my view, to describe these circumstances, in the language used by Woodhouse J. in *Moevao v. The Department of Labour* [1980] 1 NZLR 464, 467, as an "abuse of the criminal jurisdiction in general" or indeed, in the language of Mansfield J. in *United States v. Toscanino*, 500 F. 2d 267, as a "degradation" of the court's criminal process. To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one.

For these reasons and for the reasons given in the speech of my noble and learned friend Lord Griffiths, with which I fully agree, I would allow the appeal.

Lord Oliver of Aylmerton

My Lords,

A citizen whose rights have been infringed by unlawful or over-enthusiastic action on the part of an executive functionary has a remedy by way of recourse to the courts in civil proceedings. It may not be an ideal remedy. It may not always be a remedy which is easily available to the person injured. It may not even, certainly in his estimation, be an adequate remedy. But it is the remedy which the law provides to the citizen who chooses to invoke it. The question raised by this appeal is whether, in addition to such remedies as may be available in civil proceedings, the court should assume the duty of overseeing, controlling and punishing an abuse of executive power leading up to properly instituted criminal proceedings not by means of the conventional remedies invoked at the instance of the person claiming to have been injured by such abuse but by restraining the further prosecution of those proceedings. The results of the assumption of such a jurisdiction are threefold; and they are surprising. First, the trial put in train by a charge which has been properly laid will not take place and the person charged (if guilty) will escape a just punishment; secondly, the civil remedies available to that person will remain enforceable; and thirdly, the public interest in the prosecution and punishment of crime will have been defeated not be a necessary process of penalising those responsible for executive abuse but simply for the purpose of manifesting judicial disapproval.

It is, of course, axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all. But it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime. Absent any suggestion of unfairness or oppression in the trial process, an application to the court charged with the trial of a criminal offence (to which it may be convenient to refer by the shorthand expression "a criminal court"), whether that application be made at the trial or at earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the court is in no way implicated requires to be justified by some very cogent reason.

Making, as I do, every assumption in favour of the appellant as regards the veracity of the evidence which he has adduced and the implications sought to be drawn from it, I discern no such cogent reason in the instant case. I do not consider that, either as a matter of established law or as a matter of principle, a criminal court should be concerned to entertain questions as to the propriety of anterior executive acts of the law enforcement agencies which have no bearing upon the fairness or propriety of the trial process or the ability of the accused to defend himself against charges properly brought against him.

I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Griffiths and I gratefully acknowledge and adopt his recitation of the relevant authorities and the conflict of judicial opinion which arises from them. Your Lordships have, in addition, been referred in the course of argument to a number of reports of civil cases of respectable antiquity in which persons originally unlawfully detained have been released from custody in the exercise of the court's undoubted jurisdiction to prevent abuses of its own process. But those were cases in which parties to civil proceedings had sought to take advantage of their own wrong in securing the unlawful detention of another party by serving proceedings for civil arrest upon him whilst unlawfully detained. In the case of a person charged with the commission of a criminal offence following an allegedly irregular initial detention, there was, until the case of *Reg. v. Bow Street Magistrates' Court, Ex parte Mackeson* [1981] 75 Cr.App.R. 24 an unbroken line of authority in the United Kingdom

dating from the early nineteenth century for the proposition perhaps most pithily expressed by Lord Goddard CJ in *Rex v. Officer Commanding Depot Battalion, RASC, Colchester, Ex parte Elliott* [1949] 1 All ER 373 that once a person is in lawful custody in this country the court has no power and is not concerned to inquire into the circumstances in which he may have been brought here. *Ex parte Mackeson* and *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 WLR 108 which impliedly followed it, were to the contrary effect, but in a reserved judgment of the Divisional Court delivered by Stephen Brown LJ. in *Reg. v. Plymouth Justices, Ex parte Driver* [1986] QB 95, in which all the relevant authorities were fully reviewed, that court followed the earlier line of authority and rejected the decision in *Ex parte Mackeson* as having been decided *per incuriam*. *Ex parte Driver* was followed by the Divisional Court in the instant case in rejecting the appellant's claim that the criminal court had jurisdiction to consider and pass judgment upon the circumstances in which he had been brought within the jurisdiction.

The appellant invites this House now to say that the decision in *Ex parte Mackeson* is to be preferred and that a criminal court's undoubted jurisdiction to prevent abuses of its own process should be extended, if indeed it does not already extend, to embrace a much wider jurisdiction to oversee what is referred to generally as "the administration of justice," in the broadest sense of the term, including the executive acts of law-enforcement agencies occurring before the process of the court has been invoked at all and having no bearing whatever upon the fairness of the trial.

I have to say that I am firmly of the opinion that, whether such a course be properly described as legislation or merely as pushing forward the frontiers of the common law, the invitation is one which ought to be resisted. For my part, I see neither any inexorable logic calling for such an extension nor any social need for it; and it seems to me to be a course which will be productive of a good deal of inconvenience and uncertainty.

I can, perhaps, best explain my reluctance to embark upon such a course by postulating and seeking to answer two questions:

First, does a criminal court have, or should it have, any **general** duty or any power to investigate and oversee executive abuses on the part of law-enforcement officers not affecting either the fairness of the trial process or the *bona fides* of the charge which it is called upon to try and occurring prior to the institution of the criminal proceedings and to order the discontinuance of such proceedings and the discharge of the accused if it is satisfied that such abuses have taken place? Secondly, if there is no such general jurisdiction and if the executive abuse alleged consists of the repatriation of the accused from a foreign country through acts which are unlawful in the country in which they occurred, is there some special quality in this form of executive abuse which gives rise to or which calls for the creation of such a jurisdiction in this particular case?

So far as the first question is concerned, I know of no authority for the existence of any such general supervisory jurisdiction in a criminal court. It is not, of course, in dispute that the court has power to prevent the abuse of its own process and that must, I would accept, include power to investigate the *bona fides* of the charge which it is called upon to try and to decline to entertain a charge instituted in bad faith or oppressively - for instance, if the accused's co-operation in the investigation of a crime has been secured by an executive undertaking that no prosecution will take place. Thus, I would not for a moment wish to suggest any doubt as to the correctness of a decision such as that in the recent case of *Reg. v. Croydon Justices, Ex parte Dean* (unreported), 19 February 1993, where the Court quashed committal proceedings instituted after an undertaking given to the accused by police officers that he would not be prosecuted. In such a case doubt is cast both upon the *bona fides* of the prosecution and on the fairness of the process to an accused who has been invited to prejudice his own position on the faith of the undertaking. Where, however, there is no suggestion that the charge is other than *bona fide* or that there is any unfairness in the trial process, the duty of the criminal court is simply to try the case and I can see no ground upon which it can claim a discretion, or upon which it ought properly to be invited, to discontinue the proceedings and discharge an accused who is properly charged simply because of some alleged anterior excess or unlawful act on the part of the executive officers concerned with his apprehension and detention. That is not for a moment to suggest that such abuses, if they occur, are unimportant or are to be lightly

accepted; but they are acts for which, if they are unlawful, the accused has the same remedies as those available to any other citizen whose legal rights have been infringed. If they are not only unlawful but are criminal as well, they are themselves remediable by criminal prosecution. That a judge may disapprove of or even be rightly outraged by the manner in which an accused has been apprehended or by his treatment whilst in custody cannot, however, provide a ground for declining to perform the public duty of insuring that, once properly charged he is tried fairly according to law.

In *Reg. v. Sang* [1980] AC 402, 454, Lord Scarman observed:

> Judges are not responsible for the bringing or abandonment of prosecutions; nor have they the right to adjudicate in a way which indirectly usurps the functions of the legislature or jury.

Those words were used in the context of a suggested discretion to prevent a prosecution because of judicial disapproval of the way in which admissible evidence had been obtained, but they are equally applicable to other executive acts which may incur judicial disapprobation. Experience shows that allegations of abusive use of executive power in the apprehension of those accused of criminal offences are far from rare. They may take the form of allegations of illegal entry on private premises, of damage to property, of the use of excessive force or even of ill-treatment or violence whilst in custody. So far as there is substance in such allegations, such abuses are disgraceful and regrettable and they may, no doubt, be said to reflect very ill on the administration of justice in the broadest sense of that term. But they provide no justification nor, so far as I am aware, is there any authority for the proposition that wrongful treatment of an accused, having no bearing upon the fairness of the trial process, entitles him to demand that he be not tried for an offence with which he has been properly charged. Indeed, any such general jurisdiction of a criminal court to investigate and adjudicate upon antecedent executive acts would be productive of hopeless uncertainty. It clearly cannot be the case that every excessive use of executive power entitles the accused to be exonerated. But then at what point and at what degree of outrage is the criminal court to undertake an enquiry and, if satisfied, to take upon itself the responsibility of refusing further to try the case?

If, then, it be right, as I believe that it is, that there neither is nor should be any general discretion in a criminal court to enquire into the conduct of executive officers before and leading up to the institution of criminal proceedings, the second question which I have ventured to postulate arises. Where, with the connivance or at the instigation of executive officers in this country, an accused person who has taken refuge in a foreign country is brought as a result of activity unlawful in that country within the jurisdiction of an English court and is then lawfully detained and charged, is there some special quality attaching to the unlawful and abusive activity abroad which confers or ought to confer on the criminal court a discretion which it would not otherwise possess?

The matter can, perhaps, best be illustrated by a hypothetical example of two terrorists, A and B, who, having detonated a bomb in London, make their way to Dover with a view to escaping abroad. A, as a result of a quarrel with a ticket inspector, is wrongfully detained by the railway police and whilst still in wrongful custody is duly arrested for the terrorist offence and subsequently charged. B, having successfully boarded a Channel ferry, is recognised as he steps ashore in Calais by two off-duty constables returning from holiday who seize him on the quayside and take him back on board keeping him under restraint until the ferry returns to Dover where he is arrested and charged. Now nobody would, I think, suggest for a moment that the trial of A should not proceed, simply because, as a result of a wrongful arrest and detention, he has been prevented from making good his escape, although he has in fact been put in the position of being charged and brought to trial only by reason of an unlawful abuse of executive power. What, then, distinguishes the case of B and confers on the criminal court in his case a discretion to stay his trial and discharge him which the court does not possess in the case A? I can see only two possible justifications for the suggestion that the court ought, in B's case, to have such a discretion. First, it may be argued that, as a matter of international comity an English court ought to signify its disapproval of the invasion of the protective rights of a foreign state over those who come within its jurisdiction by declining to try a person who has been wrongfully removed from the protection of that state through the instrumentality of persons for whose actions the authorities of this country are

responsible. I do not find this argument persuasive. An English criminal court is not concerned nor is it in a position to investigate the legality under foreign law of acts committed on foreign soil and in any event any complaint of an invasion of the sovereignty of a foreign state is, as it seems to me, a matter which can only properly be pursued on a diplomatic level between the government of the United Kingdom and the government of that state.

Secondly, it may be argued that the unlawful activity of which complaint is made, because it results in the accused being brought within a jurisdiction from which he would otherwise have escaped, is invested with a special character because it infringes some "right" of the accused in English law to be repatriated only through a process of extradition by the state under whose protection he has succeeded in placing himself. Now it is, of course, perfectly true that the Extradition Act 1989 contains, in s. 6(4), an inhibition upon extradition from the United Kingdom unless provision is made by the receiving state that the person extradited will not, without the consent of the Secretary of State, be dealt with for (in broad terms) offences other than those in respect of which his extradition has been ordered. That provision is mirrored in s. 18 of the Act which provides that the person extradited to the United Kingdom from a foreign state will not be triable for (again in board terms) offences other than those for which he has been extradited unless he has first had an opportunity of leaving the United Kingdom. Thus a person who is returned only as a result of extradition proceedings enjoys, as a result of this statutory inhibition, an advantage over one who elects to return voluntarily or who is otherwise induced to return within the jurisdiction. But these are provisions inserted in the Act for the purpose of giving effect to reciprocal treaty arrangements for extradition. I cannot, for my part, regard them as conferring upon a person who is fortunate enough successfully to flee the jurisdiction some "right" in English law which is invaded if he is brought or induced to come back within the jurisdiction otherwise than by an extradition process, much less a right the invasion of which a criminal court is entitled or bound to treat as vitiating the process commenced by a charge properly brought. It is not suggested for a moment that if, as a result of perhaps unlawful police action abroad - for instance, in securing the deportation of the accused without proper authority - in which officers of the United Kingdom authorities are in no way involved, an accused person is found here and duly charged, the illegality of what may have occurred abroad entitles the criminal court here to discontinue the prosecution and discharge the accused. Yet in such a case the advantage in which the accused might have derived from the extradition process is likewise destroyed. No "right" of his in English law has been infringed, though he may well have some remedy in the foreign court against those responsible for his wrongful deportation. What is said to make the critical difference is the prior involvement of officers of the executive authorities of the United Kingdom. But the arrest and detention of the accused are not part of the trial process upon which the criminal court has the duty to embark. Of course, executive officers are subject to the jurisdiction of the courts. If they act unlawfully, they may and should be civilly liable. If they act criminally, they may and should be prosecuted. But I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try.

I would only add that if, contrary to my opinion, such an extended jurisdiction over executive abuse does exist, I entirely concur with what has fallen from my noble and learned friend Lord Griffiths with regard to the appropriate court to exercise such jurisdiction. I would dismiss the appeal and answer the certified question in the negative.

Lord Lowry

My Lords,

Having had the advantage of reading in draft the speeches of your Lordships, I accept the conclusion of my noble and learned friends Lord Griffiths and Lord Bridge of Harwich that the court has a discretion to stay as an abuse of process criminal proceedings brought against an accused person who has been brought before the court by abduction in a foreign country participated in or encouraged by British authorities. Recognising, however, the clear and forceful reasoning of my noble and learned friend Lord Oliver of Aylmerton to the contrary, I venture to contribute some observations of my own.

The first essential is to define abuse of process, which in my opinion must mean abuse of the process of the court which is to try the accused. Archbold (1992 edition) at paragraph 4.44 calls it "a misuse or improper manipulation of the process of the court". In *Rourke v. R.* [1977] 76 DLR (3d) 193 Laskin CJC. said at p. 205, "The court is entitled to protect its process from abuse" and also referred at p. 207 to "the danger of generalising the application of the doctrine of abuse of process". In *Moevao v. Department of Labour* [1980] 1 NZLR 464 Woodhouse J. spoke approvingly of "the much wider and more serious abuse of the criminal jurisdiction in general", whereas Richmond P., giving expression to reservations about the view in which he had concurred in *Reg. v. Hartley* [1978] 2 NZLR 199, referred at p. 470 to the need to establish "that the process of the court is itself being wrongly made use of". I think that the words used by Woodhouse J. involve a danger that the doctrine of abuse of process will be too widely applied and I prefer the narrower definition adopted by the President. The question still remains what circumstances antecedent to the trial will produce a situation in which the process of the court of trial will have been abused if the trial proceeds.

Whether the proposed trial will be an unfair trial is not the only test of abuse of process. The proof of a previous conviction or acquittal on the same charge means that it will be unfair to try the accused but not that he is about to receive an unfair trial. Again, in *Reg. v. Grays JJ., Ex parte Low* [1989] 88 Cr.App.R. 291 it was held to be an abuse of process to prosecute a summons where the accused had already been bound over and the summons had been withdrawn, while in *Reg. v. Horsham JJ., Ex parte Reeves* [1982] 75 Cr.App.R. 236 it was held to be an abuse of process to pursue charges when the magistrates had already found "no case to answer". It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial, although the trial itself could be fairly conducted. And to proceed in respect of a non-extraditable offence against an accused who has with the connivance of our authorities been unlawfully brought within the jurisdiction from a country with which we have an extradition treaty need not involve an unfair trial, but this consideration would not in my opinion be an answer to an application to stay the proceedings on the ground of abuse of process.

This last example, though admittedly not based on authority, foreshadows my conclusion that a court would have power to stay the present proceedings against the appellant, assuming the facts alleged to be proved, because I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that *prima facie* it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely *"pour encourager les autres"*.

Your Lordships have comprehensively reviewed the authorities and therefore I will be content to highlight the features which have led me to conclude in favour of the appellant. The court in *Ex parte Mackeson* [1982] 75 Cr.App.R. 24, while quite clear that there was jurisdiction to try the applicant, relied on *Reg. v. Hartley* [1978] 2 NZLR 199 for the existence of a discretion to make an order of prohibition. Woodhouse J. in *Hartley* had also recognised the **jurisdiction** to try Bennett, but expressed the court's conclusion that to do so in the circumstances offended against "one of the most important principles of the rule of law". The court's decision in *Ex parte Driver* [1986] 1 QB 95 to the contrary effect was influenced by *Ex parte Susannah Scott* [1829] 9 B. & C. 446, *Sinclair v. H.M. Advocate* [1890] 17 R.(J.) 38 and *Rex v. Officer Commanding Depot Battalion RASC Colchester, Ex parte Elliott* [1949] 1 All ER 373. *Scott* and *Sinclair* were decisions on jurisdiction and formed the basis of the decision in *Ex parte Elliott*, in which there was an application for a writ of *habeas corpus*, based on the allegation that the applicant was not subject to military

law and that he was wrongfully held in custody. My noble and learned friend Lord Griffiths has described the argument advanced by the applicant and the manner in which Lord Goddard CJ dealt with that argument in the court's judgment by reference to the cases of *Scott and Sinclair*. Then, having disposed of an argument based on provisions of the Army Act relating to arrest, the Lord Chief Justice came to "The only point in which there was any substance ... whether there has been such delay that this court ought to interfere." (p. 379A). Neither in the discussion and rejection of this point nor anywhere else in the judgment does the question of abuse of process arise and, as the judgment put it at p. 379F:

> What we were asked to do in the present case, and the most we could have been asked to do, was to admit the prisoner to bail until the court was ready to try him.

This brief review strengthens my inclination to prefer *Ex parte Mackeson* to *Ex parte Driver* and to the Divisional Court's judgment on the main point in the present case, since I consider that the true guidance is to be found not in the jurisdictional cases but in *Reg. v. Hartley*. My noble and learned friend Lord Griffiths has already pointed out that the United States authorities, in which opinion is divided, have involved a discussion of **jurisdiction** and the interpretation of the Fourteenth Amendment.

While on the subject of due process, I might take note of a subsidiary argument by the respondent: the use by the prosecution of evidence which has been unlawfully or dishonestly obtained is regarded in the United States as a violation of due process ("the fruit of the poisoned tree"), but the preponderant American view is in favour of trying accused persons even when their presence in court has been unlawfully obtained; therefore *a fortiori* the view in this jurisdiction ought to favour trying such accused persons, having regard to the more tolerant common law attitude here to unlawfully obtained evidence, as shown by *Reg. v. Sang* [1980] AC 402. My answer is that I would consider it a dangerous and question-begging process to rely on this chain of reasoning, particularly where the constitutional meaning of "due process" is one of the factors. As your Lordships have noted, the respondent also relied on *Reg. v. Sang* directly in order to support the argument that it does not matter whether the accused comes to be within the jurisdiction by fair means or foul.

The philosophy which inspires the proposition that a court may stay proceedings brought against a person who has been unlawfully abducted in a foreign country is expressed, so far as existing authority is concerned, in the passages cited by my noble and learned friend Lord Bridge of Harwich. The view there expressed is that the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the courts' conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused. Therefore, although the power of the court is rightly confined to its inherent power to protect itself against the abuse of its own process, I respectfully cannot agree that the facts relied on in cases such as the present case (as alleged) "have nothing to do with that process" just because they are not part of the process. They are the indispensable foundation for the holding of the trial.

The implications for international law, as represented by extradition treaties, are significant. If a suspect is extradited from a foreign country to this country he cannot be tried for an offence which is different from that specified in the warrant and, subject always to the treaty's express provisions, cannot be tried for a political offence. But, if he is kidnapped in the foreign country and brought here, he may be charged with any offence, including a political offence. If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed.

It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice

according to the rule of law and with respect to international law. For a comparison of public and private interests in the criminal arena I refer to an observation of Lord Reading CJ in a different context in *Rex v. Lee Kun* [1916] 1 KB 337, 341:

> ... the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State.

If proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future and thus will tend to maintain the purity of the stream of justice. No "floodgates" argument applies because the executive can stop the flood at source by refraining from impropriety.

I regard it as essential to the rule of law that the court should not have to make available its process and thereby endorse (on what I am confident will be a very few occasions) unworthy conduct when it is proved against the executive or its agents, however humble in rank. And, remembering that it is not jurisdiction which is in issue but the exercise of a discretion to stay proceedings, while speaking of "unworthy conduct", I would not expect a court to stay the proceedings of every trial which has been preceded by a venial irregularity. If it be objected that my preferred solution replaces certainty by uncertainty, the latter quality is inseparable from judicial discretion. And, if the principles are clear and, as I trust, the cases few, the prospect is not really daunting. Nor do I consider that your Lordships ought to be deterred from deciding in favour of discretion by the difficulty, which may sometimes arise. of proving the necessary facts.

I would now pose and try to answer three questions.

1. What is the position if without intervention by the British authorities a "wanted man" is wrongfully transported from a foreign country to this jurisdiction?

   The court here is not concerned with irregularities abroad in which our executive (at any level) was not involved and the question of staying criminal proceedings, as proposed in a case like the present, does not arise. It seems to me, however, that in practice the transporting of a wanted man to the United Kingdom from elsewhere (by whatever method) will nearly always take place in consequence of a request by the executive here.

2. Why should the court not stay for abuse of process if the accused has been wrongfully arrested in the United Kingdom (which is not alleged to have happened in the instant case)?

   A person wrongfully arrested here can seek release by applying for a writ of *habeas corpus* but, once released, can be lawfully arrested, charged and brought to trial. His earlier wrongful arrest is not essentially connected with his proposed trial and the proceedings against him will not be stayed as an abuse of process.

3. If at common law the rule in *Reg. v. Sang* applies to let in admissible evidence obtained by wrongful conduct on the part of the executive, why does similar reasoning not prevail where the presence of the accused has been procured by wrongful conduct in which the executive is involved?

   Reg. v. Sang exemplifies a common law rule of evidence, as explained by the speeches in that case, which applied to all admissible evidence except confessions and certain evidence produced by confessions (as to which see *Lam Chi-Ming v. The Queen* [1991] 2 AC 212.) The abuse of process which brings into play the discretion to stay proceedings arises from wrongful conduct by the executive in an international context. Secondly, although there is no discretion at common law to exclude evidence (except confession evidence) by reason of wrongful conduct, there **is** discretion to stay proceedings as an abuse of process (see *Connelly v. DPP* [1964] AC 1254) and the alleged facts of the instant case are but one example of the need for that discretion.

It has been suggested that, since the executive conduct complained of invades the rights of other countries and of persons under their protection and detracts from international comity, the remedy lies not with the courts but in the field of diplomacy. I would answer that the court must jealously protect its own process

from misuse **by the executive** and that this necessity gives particular point to the observation of Lord Devlin (which my noble and learned friend Lord Griffiths has already noted) in *Connelly v. DPP* at p. 1354:

> The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

I now turn to the question of procedure. The appellant, having been committed for trial, applied for an order of *certiorari* to quash the order for committal on the ground that the magistrates refused to adjourn the committal proceedings "to enable the point of abuse of process to be argued", presumably in the Divisional Court of the Queen's Bench Division. Although I feel obliged to consider the procedure which was followed in this case and that which must follow from the conclusion of the majority of your Lordships, I preface my remarks by saying that I agree with the answer to the certified question, and also with the order, which my noble and learned friend Lord Griffiths has proposed.

In *Ex parte Mackeson* [1982] 75 Cr.App.R. 24 the applicant applied to the Divisional Court before the day fixed for the committal proceedings for an order of *certiorari* quashing the charges against him and prohibiting the magistrates from proceeding with the committal proceedings. The Divisional Court, having held that there was jurisdiction to stay the proceedings as an abuse of process, granted prohibition. In *Ex parte Healy* [1983] 1 WLR 108, another case of alleged "disguised extradition", the single lay justice hearing the committal proceedings was invited to decide the abuse of process point and to stay the proceedings. After a five day hearing she decided the point against the accused, who then applied for an order of *certiorari*. I have difficulty in seeing how the magistrate's decision on a question of fact could have been attacked by *certiorari* but in any event the Divisional Court rejected the application on the merits. So the committal stood. In his judgment my noble and learned friend, then Griffiths LJ., said at p. 112A:

> This court considers that it was wrong to invite a single lay justice to consider a matter such as this. Whether or not there has been an abuse of process of the sort raised in these proceedings is a matter far more fitting to be inquired into by the Queen's Bench Divisional Court than by a single justice. If a point such as this is to be taken in future it should be taken in the form in which it was in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, 75 Cr.App.R. 24; that is, there should be an objection to the justice hearing the committal and the matter should be pursued before the Divisional Court by way of an application for judicial review seeking an order of prohibition. That is not to say that we have any criticism whatsoever of the way in which the justice approached her task in this case. Both the defence and the prosecution asked her to decide the question; she clearly went into it with the greatest care and we are quite unable to find any fault or criticism with any of the conclusions of fact at which she arrived. In the opinion of this court, having been asked to undertake a task which we do not think was appropriate for a single lay justice, she discharged her duties quite admirably.

and at p. 113G:

> Accordingly, I have come to the conclusion that there is no merit or substance in this application and it will be refused. As I say, if this question is to be raised in further cases the proper procedure is to use that in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, 75 Cr.App.R. 24, so that the Divisional Court may be seised of the matter, and not bring it up before a lay justice on committal proceedings. However, we anticipate that cases of this nature are likely to be very rare.

McCullough J., concurring, said at p. 113H:

> Whether this was an application properly made to the justice or whether it was one that should properly have been made in the first place to the Divisional Court, I am in no doubt that no order of *certiorari* should go. Despite the admirable way in which this justice dealt with the matter, I share the concern of Griffiths LJ. that a single lay justice should be asked to grapple with questions of this kind. It is better I think that the question should be dealt with as in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, 75 Cr.App.R. 24 even although such a course may leave one wondering precisely how a justice in such circumstances can be said to have acted in excess of jurisdiction or made an error of law.

In *Ex parte Driver* [1986] QB 95 the applicant sought prohibition in accordance with the *Mackeson* procedure, as recommended in *Healy*, but the order sought was refused on the ground that there was no jurisdiction to stay for the reasons relied on.

The *Driver* doctrine therefore held sway when the present case came before the magistrates with a view to committal. Accordingly, it is understandable that the magistrates rejected the request of the accused to adjourn while he made a *Mackeson* application and instead proceeded to commit him for trial.

My Lords, I am satisfied that, on the facts found in *Mackeson*, it was both lawful and appropriate to make an order of prohibition directed to the magistrates' court. While that court had **jurisdiction** to entertain committal proceedings, the High Court decided that to permit the criminal proceedings against the accused to continue would be an abuse of process of the court (of trial); it would therefore be equally an abuse of process to permit proceedings in the magistrates' court to be conducted (or, once embarked on, continued) with a view to committing the accused to the Crown Court for trial, which would be oppressive to the accused and a waste of the court's time. A parallel is found in the order made in *Reg. v. Telford JJ., Ex parte Badhan* [1991] 2 QB 78, where the Divisional Court prohibited the magistrates from further hearing committal proceedings on the ground that, by reason of the prejudice caused by delay, to proceed against the accused would amount to an abuse of process. In my view the fact that the decision and order are made by the High Court, although the Crown Court is the proposed court of trial, makes no difference. It is the function of the High Court to exercise supervisory jurisdiction over inferior courts, including the magistrates' court. It is, moreover noteworthy that the function of directing or giving consent to preferment of a "voluntary" bill of indictment can only be performed by a **High Court Judge** in England and Wales (or by the direction of the Criminal Division of the Court of Appeal): see Administration of Justice (Miscellaneous Provisions) Act 1933 s. 2(2), which continues in force unamended since the transfer of criminal jurisdiction on indictment to the Crown Court in 1971. What I have said is not of course intended to detract from the power of the court of trial itself, as the primary forum, to stay proceedings as an abuse of process, but the convenience of staying the proceedings at an earlier stage is obvious, when that can properly be done.

Short of allowing the proceedings to reach the Crown Court, the merit of having the case considered by the High Court in preference to the examining magistrate or magistrates is clear. In any event, notwithstanding *dicta* to the contrary, I would, on the authority of *Grassby v. The Queen* [1989] 168 CLR 1, a decision of the High Court of Australia, and of cases there cited (to which I shall presently refer), not be easily persuaded that **examining magistrates** have jurisdiction to stay committal proceedings for abuse of process. (I say nothing about the power of magistrates when sitting to try a case as a court of summary jurisdiction, as in *Mills v. Cooper* [1967] 2 QB 459).

My Lords, as I have said, the remedy sought is an order of *certiorari*. I prefer to consider that remedy according to the conventional, perhaps now "old-fashioned", principles enunciated in *R. (Martin) v. Mahony* [1910] 2 IR 695, *Rex v. Nat Bell Liquors* [1922] 2 AC 128 and *Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1952] 1 KB 338, without seeking to justify the making of an order in this case by reference to more recent views, including views based on *dicta* uttered in this House. As I see it, the magistrates here, understandably but erroneously relying on *Ex parte Driver*, acted prematurely and therefore without jurisdiction when they proceeded to hear and determine the committal proceedings without first allowing the appellant to make to the Divisional Court an application which (subject to *Ex parte Driver*) was on its face at least worthy of consideration. Having, however innocently, neglected an essential preliminary step (namely the adjournment decreed by *Ex parte Healy*), the magistrates incurred the liability to have their order of committal quashed. For an example of proceedings in which a condition precedent to jurisdiction was omitted I refer to *In re McC. (a minor)* [1985] AC 528. I would be in favour of remitting the case to the Divisional Court to reconsider it in the light of your Lordships' opinions, since one alternative would be to refuse an order of *certiorari* because an application to stay the proceedings can perfectly well be made to the court of trial, and the decision (relating to trial on indictment) would not, it seems, be reviewable: *In re Ashton* [1993] 2 WLR 846. The other, and perhaps more convenient, course would be for the Divisional Court now to hear the application for a stay. If that were decided in favour of the appellant, the court could make an order of *certiorari* and such other order, if any, as might be needed to prevent the proceedings in the magistrates' court from going ahead. It seems to me that, by analogy with

proceedings which are terminated by reason of irregular extradition procedures, the appellant, if he succeeds, would have to be given an opportunity to "escape" but, subject to that, I can see nothing to prevent him from being properly pursued in the future, for example by *ad hoc* extradition under s. 15.

Since the resolution of the point is not essential to your Lordships' decision of the appeal, I shall be brief in my discussion of whether the examining magistrates can stay committal proceedings as an abuse of process.

In *Grassby v. The Queen supra* the accused was charged with criminal defamation and the examining magistrate stayed the committal proceedings on the ground of abuse of process. The Crown appealed to the Court of Criminal Appeal of New South Wales, which set aside the stay. The accused sought special leave to appeal from that decision. The High Court granted special leave but dismissed the appeal (which involved another point, namely the refusal of a member of the Court of Criminal Appeal to disqualify himself.) Dawson J. delivered the leading judgment, holding that a committing magistrate has no power to stay the proceedings as an abuse of process. All the other members of the court, presided over by Mason, CJ., agreed except Deane J. who considered that, if the magistrate concluded (in the words of the Act) that "a jury would not be likely to convict" because the **trial court** was likely to stay the proceedings for abuse of process, he should then discharge the accused. The Judge, however, agreed in the result on the facts and his dissent was based only on his interpretation of s. 41(6) of the Justices Act.

Dawson J. said at p. 10 that the magistrate's power to stay for abuse of process "has been denied upon the highest authority in the United Kingdom." He referred to *Connelly v. DPP* [1964] AC 1254 and continued:

> See also *Mills v. Cooper* [1967] 2 QB 459, per Lord Parker CJ. Whether such comments were correct in relation to inferior courts exercising ordinary judicial functions has been doubted (see *Reg. v. Humphrys* [1977] AC 1 per Viscount Dilhorne, per Lord Salmon; to the contrary *Reg. v. West London Stipendiary Magistrate; Ex parte Anderson* [1984] 80 Cr.App.R. 143, but it is clear that they do not extend to a magistrate hearing committal proceedings. In *Atkinson v. Government of the United States of America* [1971] AC 197, 231 Lord Reid (with whom Lords MacDermott and Guest agreed) said:
>
> > The question is whether, if there is evidence sufficient to justify committal, the magistrate can refuse to commit on any other ground such as that committal would be oppressive or contrary to natural justice. The appellant argues that every court in England has power to refuse to allow a criminal case to proceed if it appears that justice so requires.
> >
> > The appellant argues that this was established, if it had been in doubt, by the decision of this House in *Connelly v. Director of Public Prosecutions* ...
> >
> > Whatever may be the proper interpretation of the speeches in *Connelly*'s case ... with regard to the extent of the power of a trial Judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried. And that proposition has no support in practice or in principle. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial.

In *Ex parte Sinclair* [1991] 2 AC 64, another extradition case, Lord Ackner in his illuminating speech pointed out at p. 78E that Lord Reid's view of the magistrate's power to refuse to commit for trial by reason of abuse of process was *obiter*. Nonetheless a view expressed by such a high authority commends respect, and Lord Reid was making his point as an integral link in his argument, to show that in extradition proceedings a magistrate has no such power.

Dawson J. observed that it has been consistently held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of a judicial or ministerial function. Citing seven Australian cases, he continued at p. 11:

> The explanation is largely to be found in history. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 (1 & 2 Philip & Mary c. 13; 2 & 3 Philip & Mary c. 10), they were required to act upon information and to examine both the accused and the witnesses against him. The

inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial.

With the establishment of an organised police force in England in 1829, the role of the justices underwent change. The most significant factor in this change was in *The Indictable Offences Act* 1848 (UK) (11 & 12 Vict. c.42), 'Sir John Jervis's Act', which provided for witnesses appearing before the justices to be examined in the presence of the accused and to be cross-examined by the accused or his Counsel.

After an interesting and valuable historical review the Judge said, at pp. 15-16:

The fact that a magistrate sits as a court and is under a duty to act fairly does not, however, carry with it any inherent power. Indeed, in my view, the nature of a magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. *A fortiori* that must be the case when its functions are of an administrative character. In *Reg. v. Forbes; Ex parte Bevan*, Menzies J. pointed out that:

> "Inherent jurisdiction" is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as "inherent jurisdiction", which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have "inherent jurisdiction".

Then, having emphasised the distinction between inherent jurisdiction and jurisdiction by implication, Dawson J. observed at p. 17:

The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him. The latter are now to be found in s. 41 of the Justices Act. But the scheme of that section, far from requiring the implication of a general power to stay proceedings, is such as to impose an obligation upon the magistrate to dispose of the information which brings the defendant before him by discharging the defendant as to it or by committing him for trial.

Having referred to s. 41 of the Justices Act, the learned Judge then said at p. 18:

There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform.

It would, of course, be convenient (as well as correct, in my view) if the examining magistrates **could not** stay for abuse of process, because judicial review of a decision to stay would be a most inadequate remedy if the real ground of review was simply that the magistrates had erred in their exercise of discretion. Moreover, their decision would not bind the court of trial, if the Attorney General were to prefer a voluntary bill.

For the reasons already mentioned and also for the reasons given by my noble and learned friends I would allow the appeal.

Lord Slynn of Hadley

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Griffiths, Lord Bridge of Harwich and Lord Oliver of Aylmerton. Despite the powerful reasons adverted to by Lord Oliver of Aylmerton I agree with Lord Griffiths that the question should be answered in the way he proposes. It does not seem to me to be right in principle that, when a person is brought within

the jurisdiction in the way alleged in this case (which for present purposes must be assumed to be true) and charged, that the court should not be competent to investigate the illegality alleged, and if satisfied as to the illegality to refuse to proceed to trial. I would accordingly allow the appeal.

Reported by Shamsiah Begum Subhan